

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

08 Civ. 3324

-against-

OPINION

PENTAGON CAPITAL MANAGEMENT PLC
and LEWIS CHESTER,

Defendants,

-and-

PENTAGON SPECIAL PURPOSE FUND, LTD.,

Relief Defendant.

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USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 10-8-10
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Sweet, D.J.

Defendants Pentagon Capital Management PLC and Lewis Chester and Relief Defendant Pentagon Special Purpose Fund, Ltd. (collectively, the "Defendants") have moved to compel Plaintiff Securities and Exchange Commission ("SEC") to produce a list of mutual funds that allowed capacity agreements, exhibits used in the investigative testimony already produced by the SEC, and any exculpatory evidence pursuant to Brady and Giglio. For the reasons set forth below, the motion is denied as to the list of mutual funds

that allowed capacity agreements and granted as to the investigative testimony exhibits. A decision as to the SEC's obligation to produce Brady and Giglio materials will be issued at a later date.

The List of Mutual Funds that Allowed Capacity Agreements Is Publicly Available Information

Defendants have requested that the SEC identify all U.S. mutual funds that allowed broker-dealers to late trade or market time between 1998 and 2004, on the basis that such information is exculpatory and solely in the hands of the SEC. However, information about each of the SEC's public enforcement actions against mutual funds is available to the public on the website of the SEC. To the extent Defendants seek information regarding mutual funds that the SEC investigated but against which it did not ultimately commence enforcement proceedings, such information is subject to various privileges from disclosure, including the attorney-client privilege, work product protection, deliberative process privilege, and law enforcement privilege.

Because the only potentially relevant non-privileged information sought by Defendants is a matter of

public knowledge, Defendants' motion to compel the SEC to provide a list of mutual funds that allowed capacity agreements is denied.

The SEC Must Produce the Exhibits Used in the Investigative Testimony It Has Already Produced

The second part of Defendants' motion requests that the SEC be compelled to produce the exhibits that were used during investigative testimony regarding late trading and market timing by mutual funds. The SEC has already produced 180 transcripts of such investigative testimony, but 157 of those transcripts were produced without exhibits. Defendants contend that without the exhibits, they are left to "guess the contents" of the transcripts. (Mot. 5.) The SEC is the only entity that maintains these documents, as the witnesses were not provided copies of the exhibits used during their testimony.

The SEC objects to this request because the language of the Document Request at issue does not specifically call for the production of exhibits. In addition, the SEC argues that production of the exhibits would be unduly burdensome and the request amounts to a fishing expedition.

The requested exhibits are connected to the testimony that has been produced by the SEC, all of which relates to late trading and market timing of mutual funds. Such information is relevant to the instant dispute. Thus, the request does not constitute a fishing expedition. Moreover, because the SEC is the sole entity with custody or control over these documents, it is reasonable for Defendants to request the SEC to produce them. For these reasons, Defendants' motion is granted as to the exhibits to the previously-produced investigative testimony.

Defendants' Request for All Exculpatory Material Pursuant to Brady and Giglio Will Be Decided at a Later Date

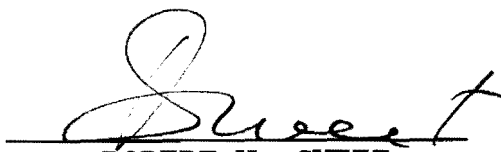
The final part of Defendants' motion seeks production of all exculpatory evidence in the SEC's possession. Defendants argue that Brady and Giglio are applicable to this case because the SEC is seeking a penalty against the Defendants. The SEC disagrees. A decision on this issue will be issued at a later date.

Conclusion

Defendants' motion to compel is denied as to the list of mutual funds that allowed capacity agreements and granted as to the exhibits to the investigative testimonies already produced by the SEC.

It is so ordered.

New York, NY
October 7, 2010


ROBERT W. SWEET
U.S.D.J.